



SUPREME COURT OF CANADA

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Case in Brief: *Orphan Well Assn. v. Grant Thornton Ltd.*

Judgment of January 31, 2019 | On appeal from the Court of Appeal of Alberta
Neutral citation: 2018 SCC 5

After going bankrupt, an oil and gas company has to fulfill provincial environmental obligations before paying anyone it owes money to, the Supreme Court has ruled.

Redwater was an Alberta oil and gas company. It owned over a hundred wells, pipelines, and facilities when it went bankrupt in 2015.

Bankruptcy is what happens when a person or company can't pay debts. Under the *Bankruptcy and Insolvency Act* (BIA), a trustee manages the process. Anyone who can prove they are owed money can make a claim, called a "claim provable in bankruptcy." Anyone with a provable claim will get paid in a certain order set out in the BIA. They won't get paid, though, if there is no money left. Other claims fall outside of the payment order. The bankrupt company's "estate" (its leftover money and property) is still responsible for them, despite the bankruptcy. Under the Constitution, only the federal government has power to make laws on bankruptcy, so the BIA is a federal law.

The Constitution also gives provinces power to make laws in specific areas. These include natural resources and property rights. Using these powers, Alberta passed laws saying oil and gas companies need a licence to operate. As part of the licence, companies have to "abandon" wells, pipelines, and facilities when they are done. This means permanently taking these structures down. They also have to "reclaim" the land (by cleaning it up). Companies can't transfer licences without permission from the Alberta Energy Regulator. They won't get it if they haven't met their responsibilities.

Most of Redwater's wells were dry when it went bankrupt. Dismantling the sites and restoring the land would have cost millions of dollars more than they were worth. To avoid paying these costs, the trustee decided not to take responsibility for (basically, to disown) the useless wells and sites. It said it was allowed to do this under the BIA. It wanted to sell the productive sites to pay people Redwater owed money to. The Regulator said that this wasn't allowed under the BIA or provincial law. It ordered the trustee to dismantle the disowned sites. The trustee said that even if the Regulator was right, the provincial abandonment orders were provable claims under the BIA. This meant the money would first go to pay people Redwater owed.

The problem was that the federal and provincial laws seemed to contradict each other. When laws are applied, they sometimes overlap. This happens even when governments stick to their own areas under the Constitution. It often comes up in bankruptcy cases. Where a valid provincial law conflicts with a valid federal law, the federal law will normally apply—as far as the conflict goes. (Federal and provincial laws should be understood as being in harmony, where possible.) In constitutional law, this is known as the "doctrine of paramountcy."

There were two main legal issues. The first was whether the BIA said the trustee could simply walk away from sites it didn't take responsibility for. The second was whether the provincial orders to remove structures from the land were provable claims under the BIA. If they were, that would mean the payment order set up in the BIA applied. Only money left at the end—if there was any—could be used to pay for taking the sites down.

The trial judge said the trustee was allowed to walk away from the disowned sites and the abandonment costs were provable claims. The majority at the Court of Appeal agreed.

The majority at the Supreme Court said the trustee couldn't walk away from the disowned sites. It said the BIA was meant to protect trustees from having to pay for a bankrupt estate's environmental claims with their own money. It didn't mean Redwater's estate could avoid its environmental obligations. The majority also said the abandonment costs were not provable claims. These costs weren't debts requiring payments—they were duties (to the public and nearby landowners). This put the abandonment costs outside the BIA's payment order scheme. That meant there was actually no conflict between the federal and provincial laws.

In this case, the trustee had already sold or given up all of Redwater's assets. The money from the sales was held "in trust" (that is, by a court) during the lawsuit. This money must now be used to abandon and reclaim the land before anything is paid to anyone Redwater owed money to.

Not debts - BIA

Duties to fellow citizens - NO CAPT. cont'd

Breakdown of the Decision: *Majority*: Chief Justice Richard Wagner allowed the appeal (Justices Abella, Karakatsanis, Gascon and Brown agreed) | *Dissenting*: Justice Suzanne Côté said there was a true inconsistency between the provincial and federal laws, as the BIA allowed the trustee to walk away from the environmental obligations and the provincial orders were provable claims—the provincial laws therefore undermined the BIA's purposes (Justice Moldaver agreed) | *Note*: Justice Sheilah Martin wasn't involved in this judgment because judges can't rule on decisions they made in a lower court; she was the dissenting judge at the Court of Appeal before she was appointed to the Supreme Court

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